U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of PAULA K. FISK and DEPARTMENT OF THE NAVY, MARINE CORPS, San Diego, CA

*Docket No. 03-1251; Submitted on the Record;*
*Issued November 19, 2003*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's requests for reconsideration as untimely and not establishing clear evidence of error.

In this case, appellant, then a 49-year-old career resource specialist, filed a claim on October 11, 1995 for an emotional condition arising out of her federal duties on September 20, 1995. In a decision dated June 5, 1998, the Office accepted the condition of an adjustment reaction. The Office, however, terminated compensation benefits after June 5, 1998 as the medical evidence failed to establish any continuing injury-related disability or injury-related residuals after that date. This was based on the May 27, 1998 medical opinion of Dr. Kaushal K. Sharma, a Board-certified psychiatrist, who had acted as the impartial medical specialist.

By decision dated July 12, 1999, the Office denied modification of its' June 5, 1998 decision regarding the termination of appellant's employment-related psychiatric condition. The Office indicated that it would, however, modify the previous statement of accepted facts of August 4, 1998 to indicate the correct date appellant ceased work. A revised statement of accepted facts dated July 12, 1999 indicated that appellant stopped work on September 21, 1995.

By decision dated September 19, 2000, the Office denied review of the case. In decisions dated April 9 and September 19, 2002 and February 27, 2003, the Office denied appellant's requests for reconsideration on the basis that they were untimely filed and failed to establish clear evidence of error.[1]

[1] The Board notes that the Office, in a June 25, 2002 decision, awarded attorney fees and, in a September 19, 2002 decision, denied modification of its previous decision. As the issue of attorney fees has not been raised on appeal, the Board will not consider this issue. The Board additionally notes that it had previously issued a decision dismissing appeal in this case on July 17, 2002.

With respect to the Board's jurisdiction to review final decisions of the Office, it is well established that an appeal must be filed no later than one year from the date of the Office's final decision.[2] As appellant filed her appeal on April 10, 2003 the only decisions over which the Board has jurisdiction are the September 19, 2002 and February 27, 2003 decisions denying her request for reconsideration.[3]

The Board finds that the Office properly denied appellant's request for reconsideration as untimely and lacking in clear evidence of error in its September 19, 2002 decision.

Section 8128(a) of the Federal Employees' Compensation Act[4] does not entitle a claimant to a review of an Office decision as a matter of right.[5] This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.[6] The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[7] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[8]

In this case, the Office issued its last merit decision on July 12, 1999. Appellant's application for review dated June 25, 2002 was received by the Office on June 28, 2002. Since appellant filed her reconsideration request more than one year from the July 12, 1999 merit decision, the Board finds that the Office properly determined that the June 25, 2002 request was untimely.

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.[9] In accordance with this holding, the Office will reopen a claimant's case for merit

[2] *See* 20 C.F.R. § 501.3(d).

[3] The Board notes as the April 9, 2002 decision of the Office is one day past the one-year filing requirement, the Board does not have jurisdiction to review it. *Id.*

[4] 5 U.S.C. § 8128(a).

[5] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[6] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

[7] Although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606.

[8] 20 C.F.R. § 10.607.

[9] *Leonard E. Redway*, 28 ECAB 242 (1977).

review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[10]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[14] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[15] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.[16] The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[17]

The evidence and arguments submitted by appellant and her representative do not establish clear evidence of error.

In a June 25, 2002 request for reconsideration, appellant's representative argued that she was exposed to a hostile work environment and she was injured as a result. Reference was made to a report of investigation and a whistle blower report. The representative stated that a medical report from Dr. Ronald Shlensky was ignored and brushed aside on the technical ground of "untimeliness" in the previous motion for reconsideration dated March 14, 2002. The representative argued that as the Office provided an extension of time, the previous March 14, 2002 reconsideration request was timely. The representative further argued that the Office failed to demonstrate that appellant's condition was nonoccupational in nature, the statement of accepted facts was inadequate and erroneous and the opinion of Dr. Sharma, the independent medical adviser, was fatally flawed.

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[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996); *see also* 20 C.F.R. § 10.607(b).

[11] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[12] *See Leona N. Travis*, 43 ECAB 227 (1991).

[13] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

[14] *See Leona N. Travis*, *supra* note 12.

[15] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[16] *Leon D. Faidley, Jr.*, *supra* note 5.

[17] *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

Evidence was submitted subsequent to the request for reconsideration. This included letters dated August 12, 14 and 28, 2002 and October 26, 1996, wherein appellant restated her allegations pertaining to her working conditions and set forth arguments pertaining to her request to exclude the report of Dr. Jeffrey Moran, the second opinion physician. In light of the voluminous number of exhibits submitted, the evidence will be grouped into general categories to facilitate an easier evaluation.

Evidence has been submitted regarding allegations pertaining to appellant's working conditions.[18] She contends that she was exposed to a hostile work environment. Appellant appears to argue that the Office failed to set forth an accurate statement of accepted facts. The most recent statement of accepted facts is dated July 12, 1999. The Board notes that the incidents which the Office considered to be compensable factors of employment in its July 12, 1999 statement of accepted facts, are in the same general "stressful and unhealthy environment" as those incidents identified by the Office in its March 26, 1998 statement of accepted facts, which Dr. Sharma reviewed when setting forth his May 27, 1998 impartial medical opinion, upon which the Office attributed determinative weight to, in finding that appellant's employment-related disability had ceased as of June 5, 1998. Dr. Sharma's May 27, 1998 report

[18] Evidence concerned appellant's allegations regarding her working conditions include: (1) January through March 1997 congressional correspondence concerning the alleged improprieties at the Family Service Station, Naval Station Miramar; (2) a June 11, 1997 report of investigation which concluded that appellant failed to demonstrate, by a preponderance of the evidence, that she was harassed as a result of her sex, age or in reprisal for her protected activity. It further found that appellant failed to establish herself as a handicapped individual. The investigator additionally found that, although witnesses and statements written by several former employees of the employing establishment described the work environment as hostile, the work environment appears to have been hostile for all employees and not only appellant; (3) a July 25, 2002 story submission written by appellant and her husband regarding what she went through with the employing establishment and her dealings with the Office and how appellant will not eat until the Office properly adjudicated her claim; (4) a March 6, 1996 memorandum from a Commanding Officer of the employing establishment pertaining to the investigation of the fraud, waste and abuse complaint. The memorandum found "specific complaints of mismanagement could not be substantiated. However, a problem with the reliability of the Family Service Center electronic activity records have been substantiated. Management is aware of the problem and is currently taking steps to remedy this situation and to make the data more reliable;" (5) numerous witness statements dated November 6, 1995, April 12, May 10, 14 and May 23, 1996 indicating the nature of the relationship between appellant and David Neher, observed outbursts of hostility by Mr. Neher against appellant. An undated statement from Marcia Guild indicated her feelings about management at the employing establishment and statements regarding Mr. Neher's behavior, but failed to mention appellant; (6) an April 2, 1996 letter from appellant's husband stating that Mr. Neher called appellant at home after work hours to discuss the fact that she had departed a meeting; (7) a September 24, 1995 letter from Mr. Neher to appellant apologizing for events occurring on September 20, 1995, when he had incorrectly informed her that her leave request was the subject of a meeting; (8) a copy of a June 25, 1997 termination action of Mr. Neher; (9) a June 16, 1997 letter to Senator Feinstein from the employing establishment regarding funds from the Transition Assistance Management Program (TAMP) and Relocation Assistance Program (RAP); (9) a copy of an October 19, 1999 Consent and Order to proceed before Magistrate Judge Burns for enforcement of settlement agreement only; (10) a June 20, 1995 formal grievance filed by appellant regarding the TRAC committee; (11) a June 20, 1995 formal grievance filed by appellant regarding harassment by Mr. Neher; (12) copies of the November 5, 1996 hotline completion report and the November 22, 1996 closure report, finding that no criminal violations were substantiated, but the investigation revealed ineffective and unprofessional management practices and a confusing accounting practice; (13) copies of job descriptions for a career resource specialist, manager of the Spousal Employment Assistance Plan and Coordinator for Volunteers at the NAS Miramar Family Service Center; (14) and numerous letters by appellant and her representative regarding the status of the reconsideration claim; and an express mail receipt.

stated: "The accepted facts provided to this examiner by the Department of Labor, regarding [appellant's] work condition clearly indicates that the workplace she was employed at was not only less than optimal, but was stressful and unhealthy. There were frequent confrontations between her supervisors and others." Dr. Sharma diagnosed an adjustment disorder, which he opined had started in October 1995. He opined, however, that at the time of his report appellant was not demonstrating sufficient symptoms which would prevent her from being employed in a capacity for which she is qualified. Dr. Sharma opined that there was no reason why appellant could not function in a similar fashion in a job environment. He further opined that appellant's present problems were related to the fact that she was in dispute with the Department of Labor and he saw this as a practical problem unrelated to the issue of mental health.

None of the evidence submitted is sufficient to change the factors of employment identified in either the March 26, 1998 statement of accepted facts, upon which Dr. Sharma relied or verified a new compensable work factor which would indicate a procedural error on the part of the Office. The June 11, 1997 report of investigation supported that the work environment was hostile for all employees and was not specific to appellant. In fact, it concluded that appellant had failed to demonstrate, by a preponderance of the evidence, that she was harassed as a result of her sex, age or in reprisal for her protected activity. A March 6, 1996 memorandum found that specific complaints of mismanagement could not be substantiated, but found there was a problem with data reliability. The term "clear evidence of error" is intended to represent a difficult standard. The claimant must present evidence which on its face, show that the Office made a mistake (for example, proof that a schedule award was miscalculated). Evidence which, if submitted before the denial was issued would have required opening the case for further development, is not clear evidence of error and would not require a review of the case.[19]

The medical evidence submitted on reconsideration included: (1) an October 12, 1995 medical report from a Dr. Andrea Roberson noting that appellant had an increase in chest pains. She noted that appellant attributed the increase in her symptoms to being chased down a hallway on September 20, 1995 which lead her to believe she could be a victim of battery and assault; (2) a September 21, 1998 form report from Dr. Phillip Carman, diagnosing "major depression," but contains no discussion on causal relation; and (3) an August 24, 2002 medical report from Dr. Joseph Abrahams a Board-certified.

The medical evidence submitted is also insufficient to present clear evidence of error to present a conflict with Dr. Sharma's opinion that appellant's work-related disability had resolved by June 5, 1998. As noted, Dr. Carman's September 21, 1998 report does not address causation. The event of September 20, 1995 to which Dr. Roberson refers to in her report of October 12, 1995 has not been established as having occurred. Moreover, the report is *prima facie* irrelevant to the issue of whether appellant's work-related disability had resolved by June 5, 1998.

In an August 24, 2002 medical report, Dr. Abrahams diagnosed depressive disorder and borderline personality disorder. He identified three stressors as contributing to her emotional condition. These were: (1) the unprofessional behavior of appellant's supervisors; (2) appellant

[19] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

was "stymied" in her professional development; and (3) the additional burden of being required to handle the walk-in clients. Dr. Abrahams opined that appellant was depressed and severely impaired. He observed the effects of insomnia and stated that her capacity for initiating activities was limited.

The Board finds that this report is insufficient to meet the "clear evidence of error" standard for an untimely reconsideration request. Although the Office had accepted stressors identified as number one and three as being work-related stressor, number two concerning professional development is not a compensable factor of employment. The Board has held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment as they do not involve the employee's ability to perform his or her regular or specially assigned work duties, but rather constitute his or her desire to work in a different position.[20]

A careful review of the report reveals that Dr. Abraham made his own findings of fact of the case.[21] This reduces his report to little probative value as it is based on an inaccurate factual history[22] and a medical expert may only give an opinion on medical questions, not to find facts.[23] Even if Dr. Abraham had been working from the Office's statement of accepted facts, his report would be insufficient to show "clear evidence of error." It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Thus, evidence such as a well-rationalized medical report that, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and does not require merit review of a case.[24] Accordingly, Dr. Abrahams report does not establish clear evidence of error to outweigh or cause a conflict with Dr. Sharma's impartial medical report.

In an October 26, 1996 letter, appellant argued that the report of Dr. Moran, the second opinion physician, should be excluded. She alleged that Dr. Moran's examination and report were incompetent and he was an inappropriate doctor to be referred to because of his sexual misconduct with a patient and resulting disciplinary actions by the California Board of Medical Quality Assurance. Evidence submitted included: (1) a January 2, 1997 letter from the Federally Employed Women Legal and Educational Fund, complaining about the Office's procedures pertaining to referral to a psychiatrist who had been suspended for sexual misconduct with patients, gross negligence and incompetence; (2) a copy of a Medical Board of California Search Results noting that Dr. Moran's license had been revoked as of March 29, 2000; (3) an April 24, 1998 letter of the Office advising that appellant's claim would not be decided on

[20] *Donna J. DiBernardo*, 47 ECAB 700, 703 (1996).

[21] See pages 9, 11-12 of the report.

[22] *Daniel J. Overfield*, 42 ECAB 718 (1991). (The Board has held that medical opinions, which are based on an incomplete or inaccurate factual background, are entitled to little probative value in establishing a claim).

[23] *See Barbara Bush*, 38 ECAB 710, 714 (1987) (it is the function of the medical expert to give an opinion only on medical questions, not to find facts).

[24] *Annie Billingsley*, 50 ECAB 210, 212, n.12 (1998); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.a (June 2002).

Dr. Moran's report, but on the impartial medical examiner's report as a conflict had been declared. It further stated that Dr. Moran was an appropriate doctor to evaluate appellant as the incidents which had resulted in the disciplinary actions occurred 15 years ago and there was no record that he had engaged in any further inappropriate behavior; (4) and a May 13, 2002 email describing why Dr. Moran's licensed was revoked on March 29, 2000.

The Board notes that Dr. Moran had examined appellant on August 7, 1996 as the second opinion physician. The evidence submitted on reconsideration is insufficient to establish clear evidence of error that the Office erred in referring appellant to Dr. Moran at the time of her examination. This issue had been previously addressed by the Office and Dr. Moran was found to be an appropriate physician at the time appellant had underwent her examination. The new evidence concerning Dr. Moran's professional status as of March 29, 2000, when his license was revoked is irrelevant to appellant's case as her examination had occurred almost four years prior. Therefore, at the time Dr. Moran had examined appellant, he was a duly licensed physician in the jurisdiction where the examination took place. Thus, there would be no basis for discarding the medical report from him based on his inappropriate conduct which later led to the loss of his license in March 2000. Moreover, none of the conduct for which Dr. Moran had his licensed revoked was alleged to have either involved appellant or to have affected his evaluation of her. Furthermore, the Office had relied on the impartial examination of Dr. Sharma in establishing and terminating her benefits. Although both appellant and her representative contend that Dr. Moran's report tainted the referee examination, there is no clear and convincing evidence to establish such as each physician conducts his own examination and draw their own conclusions. Accordingly, these arguments hold no reasonable color of validity and failed to establish clear evidence of error on the part of the Office.[25]

Appellant argues that, as the Office provided an extension of time, the previous March 14, 2002 reconsideration request was timely. Although the record contains a letter dated February 12, 2002 from the Office extending the time for the reconsideration request, it does not change the fact that the last merit decision of record in this case was July 12, 1999. Accordingly, appellant's reconsideration request of March 14, 2002 would still be subject to the one-year filing limitation as set forth in section 10.607(a).

As appellant has failed to establish clear evidence of error on the part of the Office, the Office properly denied her request for reconsideration in its September 19, 2002 decision.

The Board further finds that the Office also properly denied appellant's request for reconsideration as untimely and lacking in clear evidence of error in its February 27, 2003 decision.

As previously noted, the Office had issued its last merit decision on July 12, 1999. Appellant's reconsideration request dated February 6, 2003 was received by the Office on February 11, 2003. Since this reconsideration request was filed more than one year from the July 12, 1999 decision, the Board finds that the Office properly determined that the said request was untimely.

[25] *John F. Critz*, 44 ECAB 788, 794 (1993).

The Board further finds that the evidence and arguments submitted by appellant do not establish clear evidence of error as it does not raise a substantial question as to the correctness of the most recent merit decision and are of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board notes that the issue in this case is a medical one of whether appellant's employment-related emotional condition had resolved by June 5, 1998. The record reflects that two medical reports have been submitted in support of the request for reconsideration.[26] This includes the previously discussed August 24, 2002 report of Dr. Abrahams and an October 28, 2002 report from Dr. Abrahams, which discussed whether appellant ever had any work capacity and concluded in the negative. The Board finds that Dr. Abrahams' October 28, 2002 report is insufficient to establish clear evidence of error. Although he provides an explanation as to why appellant was incapable of working following the onset of her depression, the Board previously found that his initial report of August 24, 2002 had little probative value as it was based on an incorrect factual history. Thus, the conclusions that Dr. Abrahams reaches in his October 28, 2002 report, are also based on an improper factual history and is of little probative value. Moreover, even if this evidence, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, it does not constitute clear evidence of error to require a merit review of this case.[27] Accordingly, Dr. Abrahams report does not establish clear evidence of error to outweigh or cause a conflict with Dr. Sharma's impartial medical report.

Appellant's representative has further submitted legal arguments that have no legal color of validity and are insufficient to show clear evidence of error in the Office's denial of her claim.[28] The Board notes that many of the contentions raised in the February 6, 2003 pleading, have been previously discussed in the first part of this decision and will be elaborated only to the extent necessary.[29]

Appellant contends that the Office should not have referred her for an impartial referee examination because the second opinion process was flawed and the resulting report from the impartial medical examiner should be discarded. This argument was partially addressed in the earlier part of this decision. Appellant now contends that Dr. Moran's report has somehow tainted the impartial medical examination; however, there is no clear and convincing evidence to establish such a contention. As previously discussed, Dr. Moran was properly licensed at the time of his examination of appellant. The Office found that the results of his August 1996 evaluation conflicted with those of appellant's treating psychologist, Dr. Carman and, pursuant to section 8123(a),[30] properly referred appellant to an impartial medical specialist, Dr. Sharma.

[26] The Board notes that the March 11, 2002 report of Dr. Ronald Shlensky had been previously considered by the Office in its April 9, 2002 decision.

[27] *See supra* note 24.

[28] *Constance G. Mills* 40 ECAB 317 (1988).

[29] Appellant appears to dispute the September 19, 2002 decision of the Office. (See pages 7 through 20 of the February 6, 2003 pleading. As majority of the representative's discussion had been previously addressed by the Board in the first part of this decision, only new arguments will be discussed.

[30] 5 U.S.C. § 8123(a).

Despite appellant's contention, this was proper procedure under section 8123(a), was not an abuse of the Office's discretion and the report from the impartial medical examiner was not "fruit from the poisonous tree." Moreover, each physician conducts his own examination of appellant and makes their own medical conclusions.[31] In this case, the Office found that the weight of the medical opinion evidence rested with the May 27, 1998 report of Dr. Sharma, who found that appellant was disabled from a work-related adjustment reaction for the period February 6, 1996 through June 5, 1998, but had no injury-related disability following June 5, 1998. Although appellant contends that his report was defective since the Office had amended its statement of accepted facts on July 12, 1999 the Board notes that this argument is without merit as the previous statement of accepted facts of August 4, 1998 was amended to indicate the correct date she ceased work.

Appellant argues that the Office erred in not issuing her a notice of proposed termination when it initially accepted the claim for a set period of disability. Under section 10.540 of the applicable regulations,[32] the Office, before it terminates compensation, is required to provide the beneficiary of the compensation a written notice of the proposed action and allow him or her 30 days to respond to the notice with evidence or legal argument in support of entitlement to continued compensation payment. The regulations further provide, however, that no notice will be given if the beneficiary has no reasonable basis to expect that compensation will continue. The regulations list such situations as, when a claim for compensation is made for a specified period of time and that time has expired; when a beneficiary dies; when the Office reduces or terminates compensation upon an employee's return to work; or termination of payment of medical benefits after a physician indicates that further medical treatment is not necessary or has ended.[33] In this case, the Office did not need to issue a notice of proposed termination as there was no reasonable expectation of ongoing compensation since Dr. Sharma had indicated that there were no further injury-related residuals.[34] Accordingly, appellant's argument is without merit.

Appellant next disputes the issue of a timely filing for a request for reconsideration. Her representative initially argues that he has met the standard for requesting reconsideration under the Office's discretionary authority under 5 U.S.C. § 8128(a),[35] as he presented new evidence and legal arguments not previously considered. As previously stated, the Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[36] In this case, the Office had issued its last merit decision on July 12, 1999. Appellant had one year from July 12,

[31] *See generally Helen K. Holt*, 50 ECAB 279, 282 (1999).

[32] 20 C.F.R. § 10.540(a).

[33] *See* 20 C.F.R. § 10.540(b).

[34] *Id.*

[35] 5 U.S.C. § 8128(a).

[36] *See supra* note 8.

1999 in which to timely file a request for reconsideration. She asserts that she had timely appealed the July 12, 1999 merit decision and the Office had never mentioned the issue of timeliness in its September 19, 2000 decision. The Board notes that the Office's September 19, 2000 decision denied review of the case as there was insufficient evidence to warrant merit review. Thus, although appellant's request for reconsideration was timely filed, the Office did not perform a merit review of the evidence as the evidence submitted was insufficient. A reconsideration decision, upon which a nonmerit review is performed, does not confer a right to reconsideration. The only avenue of appeal is review by the Board. Contrary to appellant's contention, this would not change the one-year time limitation from which appellant must file a reconsideration request to obtain a review of the last merit decision of July 12, 1999.

The one-year time frame for filing a timely reconsideration request would commence July 12, 1999 and end on July 13, 2000, which was a Thursday. Thus, any requests for reconsideration received after July 13, 2000 would be untimely and subjected to the clear evidence of error standard. Moreover, the only avenue of appeal available would be before the Board. Such time limits are set by regulations. Any contentions by appellant pertaining to a waiver of such filing requirements have no reasonable color of validity.

As appellant has failed to establish clear evidence of error on the part of the Office, the Office properly denied her request for reconsideration in its February 27, 2003 decision.

The February 27, 2003 and September 19, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 19, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member